1963

Crest Motors, Inc. v. Alexander S. Fish : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

CREST MOTORS, INC.,
Plaintiff and Respondent

vs.

ALEXANDER S. FISH,
Defendant and Appellant

Case No.
9958

RESPONDENT'S BRIEF

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PRELIMINARY STATEMENT

Respondent disagrees with the Statement of Facts as set forth by the appellant in his brief since the evidence was conflicting and the facts as stated by the Appellant represent basically his testimony in the trial court with the emphasis placed on his theory of the case, ignoring the familiar principle requiring a fair statement of the facts upon which the decision of the trial court was predicated and based upon which judgment was awarded the Respondent.

RESPONDENT'S STATEMENT OF FACTS

In February, 1962, Respondent purchased a 1960 Cadillac and a 1956 Chevrolet from the Appellant as the result of a telephone conversation between the Appellant and Mr. Dee Timothy wherein the Appellant wanted to sell the automobiles to Respondent and indicated that he, the Appellant, had bought the Cadillac off the curb (R.30) and that he had taken the 1956 Chevrolet in as his commission on the sale of a new car (R. 31).

The Appellant, Alexander Fish, had his place of business in Detroit, Michigan, while Respondent has its place of business in Salt Lake City (R. 28), hence negotiations for the sale and purchase were conducted by telephone.

After the parties had agreed on a purchase price, $2,700.00 for the Cadillac and $300.00 for the Chevrolet, if purchased together, (R. 30, 31), the deal was consumated, and Appellant shipped the cars to Salt Lake City, by rail. (R. 37).

Subsequently, the Respondent had repairs made on the Cadillac, totalling $355.20, and paid transportation on the automobile totaling $106.80. (R. 15, 16).

Thereafter, Respondent sold the Cadillac, and

when it was discovered that the vehicle was in fact a stolen automobile, the Respondent was obliged to return it to its rightful owner which entailed repurchase of the vehicle. (R. 34)

Mr. Kenneth E. Schefski, the owner and manager of the Independent Auto Damage and Appraisers company, testified that he examined the Cadillac that the serial number stamped on the frame definitely established that it was an automobile Serial No. 60L059259, (R. 25, 26), whereas the title furnished by Appellant supposedly covering this vehicle was the title to an automobile Serial Number 60L030424. (Ex. 3).

Mr. Fish, the Appellant, indicated in his testimony that the automobile had been stolen from a Cadillac dealer in Michigan, and the door plate identification number, which is a small plastic plate, had been removed, and another plate attached, with a number corresponding with the title he provided the Respondent. (R. 97).

The trial court ruled for the Plaintiff and found that Plaintiff had purchased the automobile from Mr. Fish, the Appellant.

Other material facts will be set out as they relate more specifically to the points raised by the Appellant as a basis for his appeal.

Statement of Points

I

THE FINDINGS OF THE TRIAL COURT THAT RESPONDENT PURCHASED THE AUTOMOBILE IN QUESTION FROM THE APPELLANT IS CONCLUSIVE OF POINT I OF APPELLANT'S BRIEF RELATING TO THE QUESTION OF AGENCY.

II

ASSUMING THAT AN AGENCY RELATIONSHIP DID EXIST, THEN APPELLANT WAS SO NEGLIGENT IN THE PURCHASE OF THIS VEHICLE THAT PLAINTIFF WOULD HAVE BEEN ENTITLED TO RECOVER.

ARGUMENT

POINT I

The findings of the Trial Court that Respondent purchased the automobile in question from the Appellant is conclusive of Point I of Appellant's brief relating to the question of agency.

The Court having found that the Respondent purchased the 1960 Cadillac from the Appellant, under the familiar principle that the evidence will be examined to determine its sufficiency to support that determination, and that this Court will not substitute its analysis of the evidence and the weight thereof for that of the trial court, the proper inquiry is as to whether there is competent evidence to support the determination of the trial court.[1] It becomes obvious therefore, that Appellant's statement at page 10 of his brief that "It is considered that the record clearly discloses that the Defendant served as agent-factor of the Plaintiff in the purchase of the 1960 Cadillac automobile concerned herein," is erroneous, and an assumption, which flies in the face of the scope of the inquiry of this court. If there is competent evidence from which the Court could find as it did, the judgment must be sustained.[2]

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1. *Dalton* v. *Wadley*, 11 Ut. 2d 84, 385 P. 2d 69; *Christensen* v. *Christensen*, 9 Ut. 2d 102, 339 P. 2d 101; *Naujoks* v. *Suhrmann*, 9 Ut. 2d 84, 337 P. 2d. 967; *Child* v. *Child*, 8 Ut. 2d 261, 332 P. 2d. 981.
2. *Story* v. *Grant*, 2 Ut. 2d 421, 276 P. 2d 489; *Christensen* v. *Christensen*, sapra.

The evidence which sustains the Court's ruling is as follows:

Mr. Dee Timothy, testified that in the telephone conversation he had with the Appellant concerning this automobile Mr. Fish represented to him that he, Mr. Fish, had purchased the Cadillac off the curb (R. 30),that Mr. Fish quoted him a price of $2,700 for the car in a package deal (R. 30, 31), that he, Mr. Timothy, said that "For this year and model of car this is an awfully cheap price" (R. 30), that Mr. Fish replied that this is what he thought before he bought it, so he sent it down and had it checked by the police before he bought it. (. 30, 120); that the telephone conversations took place on February 21, 1962, and that he agreed to purchase the two automobiles (R. 31), and made arrangements to wire the money to Mr. Fish's account at his Detroit bank as per instructions from Mr. Fish (R. 31, 47, 48).

Mr. Timothy also testified that as to the 1956 Chevrolet included in the package deal at $300.00, that he had been offered this car on prior occasions by Mr. Fish who said that he had sold it new theretofore and had now taken it back as his commission on the sale of a new automobile to the same people (R. 31).

Exhibit 1, is the check to First Security Bank for funds to be wired to Alexander Fish, dated February

21, 1962 for payment in full for a 1960 Cad. S. deVille, 56 Chev BA 4 Dr. Exhibit 2 is the draft forwarded to the account of Alexander Fish at Manufacturers National Bank in Detroit. These funds arrived on February 23, 1962. (R. 33).

The title to the 1960 Cadillac reveals that it was notarized February 21st, by Alexander Fish. Fish admitted that he gave his personal check to the owner of the 1960 Cadillac in payment thereof, (R. 84, 96) although he contended that his account was without funds to cover the check until Respondent's draft reached his bank (R. 96).

Neither the 1956 Chevrolet title nor the 1960 Cadillac title were in the name of Mr. Fish when received by the Respondent, but Mr. Timothy explained that this is a usual business practice whenever an automobile is taken in, and that "The usual practice is that you never change the title into your own name. Regardless of whether the title comes from Mr. Fish or a private title, you only hold the title until you make sure it is signed off correctly. You only hold the title in your possession until you sell it, and then the State issues a new title to the customer or whoever buys the car. (R. 35, 36). As Mr. Timothy stated, if the Court were to deal with him, the transaction would be handled the same way. (R. 36).

On cross examination, Mr. Timothy re-iterated that Mr. Fish had agreed to sell him cars (R. 40), that Mr. Fish sold him cars, perhaps as many as 25 (R. 41), that on one occasion, when he was in Detroit, Mr. Fish personally delivered him two titles out of his wallet, representing two automobiles that he purchased from Mr. Fish while there. (R. 43).

Mr. Timothy indicated that he never had paid Mr. Fish a commission on any transaction, only the price for the automobile which Mr. Fish quoted him as the purchase price of the car (R. 45).

Mr. Timothy indicated also, that he had visited Mr. Fish, the Appellant, at his home in Detroit, that Mr. Fish had automobiles in his yard and on a lot immediately adjoining his home (R.50); that in fact, while there he purchased two automobiles from Mr. Fish which were parked on the adjoining lot (R. 50).

It is clear that the Respondent purchased the 1960 Cadillac from the Appellant, just as he purchased the 1956 Chevrolet from the Appellant, and many other vehicles, including two while in Detroit, and that the evidence amply sustains the decision of the trial court that there was an independent buyer-seller relationship between the parties in dealing with the Cadillac, and not an agency relationship.

At page 11 of his brief, Appellant cites the Restate-

ment of Agency, 2nd Ed. Sec. 14, which sets up factors indicating that no agency exists (1) that he is to receive a fixed price for the property irrespective of the price paid by him, [This is the exact fact in the instant case, where the price quoted was $2,700.00 for the Cadillac and $300.00 for the Chevrolet (R. 30, 31)] (2) that he acts in his own name and receives title to the property which he is thereafter to transfer [In the instant case, Mr. Fish received the title and forwarded it to the Respondent in keeping with the usual business practice which dictates that the dealer does not appear on the title, but of course, could if he so desired] (3) that he has an independent business in buying and selling similar property [In the instant case the testimony clearly establishes that this is precisely what Mr. Fish does (R. 30, 31)].

It is true, that Mr. Fish sought by his testimony to establish that Respondent paid a commission on this transaction and that the commission was stated to the Respondent in advance (R. 76). This was flatly denied by Respondent (117, 45), and on cross examination Mr. Fish left some question about his prior statement (R. 86, 87).

Since the trial court had the opportunity to observe the witnesses, and evaluate their demeanor as well as their testimony, these factual questions have already been resolved favorably to the Respondent

and his credibility as compared to that of the Appellant firmly established.[3]

Appellant, at page 12 of his brief recites several sections of the Michigan law, excluded by the trial court by reason of lack of proper foundation (R. 66), and equally inappropriate in Appellant's brief before this Court, as pursuasive of the proposition that Appellant was not the owner of the vehicle he bought in Michigan, and that some one else must have been the owner, since he would have been violating some of those statutes if it were otherwise.

Counsel for Respondent, suggested on cross-examination of Mr. Fish that there were perhaps reasons that Mr. Fish proceeded as he did to avoid putting titles in his own name, and although Mr. Fish was quick to deny those reasons, they are perhaps as pursuasive reasons as now suggested by Appellant in his brief. (R. 109).

Certainly, the statutes of Michigan whatever they may say do not change the fact that the trial court believed the Respondent when he said that he purchased this automobile from Mr. Fish, and that Mr. Fish had told him that he, Mr. Fish, had bought if off the curb. (R. 30). What complications this provides for Mr. Fish with the Michigan law is not the con-

3. *Page* v. *Federal Security Insurance Co.*, 8 Ut. 2d 226, 332 P. 2d 666; *Child* v. *Child*, 8 Ut. 2d 261, 332 P. 2d 981.

cern of this case, nor is the Michigan law probative of the facts of the case.

Appellant cites American Jurisprudence, Brokers, Sec. 4, and Section 2, at p. 14 of his brief. However, the findings of the Court clearly take the present case out of the factual situations covered by either. Similarly with the citation of American Jurisprudence, Factors, Section 6, and 35 C.J.S. Brokers, Section 4. While probably good statements of general law, none is applicable to the facts here established by the trial court.

A brief statement of the facts of the case of *Twohig* vs. *Lawrence Warehouse Co.*, 118 Fed. Supp. 322, cited by the Appellant serves at once to distinguish that case. In the case, the Plaintiff became the agent of Mid States Packing Company for the purchasing of cattle on a commission basis. In the present case, the court found from substantial and competent evidence, that Respondent purchased the automobile from the Appellant, negating any agency theory advanced by Appellant.

The cases *Bashford* vs. *A. Levy & J. Zentner Co.*, 123 Cal. App. 204, 11 P. 2d 51; and *Couturie* vs. *Porsch*, 134 S.W. 413 are similarly inapplicable, and in the case of *Beakley* vs. *Ranier*, 78 S.W. 702, the question of agency or lack thereof plays no part in the decision.

A case of infinitely more assistance to the Court is the case of *Pashalian* vs. *Big-4 Chevrolet Company, Inc.*, (Mo. App.) 348 S.W. 2d 628. In that case, Pashalian contacted a used car dealer named Lesch to purchase a 1958 Chevrolet Bel-Air four-door Sedan. Pashalian actually instigated the transaction in that case, however. Lesch took a deposit and gave him an allowance for his trade-in. Lesch then went to a new car dealer, the Defendant, and told the salesman that he wanted to buy such a car and got a quotation on the price. Thereafter, Lesch told the Defendant the name of the person in whose name the papers should be made, and the Defendant Big-4 executed the necessary documents direct to Pashalian. Lesch gave his check to Big-4, and Pashalian gave his check to Lesch, in payment for the car and received the car. The Lesch check was subsequently returned by the bank marked "account closed." Pashalian instituted a suit for conversion after the Defendant Big-4 obtained possession of the automobile when it was returned for servicing. As in the case at bar, Pashalian, the buyer, dealt solely with Lesch, and the Defendant contended the Lesch was the agent of Pashalian in obtaining the automobile from the Big-4 Chevrolet Company.

The court in considering the question of agency, stated first, that there is never a presumption of agency, and the burden of establishing it is on the party asserting it and by whom it is alleged to exist.

The court concluded from the evidence that Plaintiff dealt solely with Lesch, and thought he was buying from Lesch; that there was no evidence that Plaintiff even knew the Defendant. The Defendant knew that it was transferring title directly to Pashalian, but it had a direct transaction with Lesch.

The court after reviewing the evidence was of the opinion that there was nothing about the transaction which would justify a finding that any agency existed between Pashalian and Lesch, and affirmed a judgment for the Plaintiff, Pashalian.

In the case at bar, Respondent thought he was dealing directly with Fish, did not know the party prior in the transaction to Fish, and the title passed directly from the prior party to the Plaintiff.

POINT II

Assuming that an agency relationship did exist, then Appellant was so negligent in the purchase of this vehicle that Plaintiff would have been entitled to recover.

Appellant's second point is completely outside the decision of the Trial Court. It assumes that Appellant was Respondent's agent, that the purchase was from another by Appellant as agent for the Respondent, and then asserts that the record establishes reasonable care and diligence on the part of the Appellant in handling the purchase.

Respondent asserts that the decision of the trial court was and is conclusive of Appellant's second point. However, the Respondent's testimony establishing lack of diligence on the part of the Appellant is such that it is clear that Appellant could not prevail even if he was correct on the question of agency.

Respondent's testimony establishing lack of diligence on the part of the Appellant is that he represented that he had taken the vehicle to the police for inspection when in fact he had not (R. 30, 75); that all he did was call the police station and read them what was on the title (R. 75, 76, 99, 100), from which, naturally, nothing could be determined about the automobile itself; that he at no time examined the permanent number stamped in the frame of the automobile, but only looked at the plastic number

on the door frame (R. 93), which is removable being merely screwed on (R. 93), and this despite his testimony that he "figured something was wrong" (R. 75); that he called Mr. Timothy and said "Stop wiring the money. Wait until I call you back . It doesn't look good on it. And the guy just doesn't look right to me." (R. 76). On cross examination he re-iterated this feeling that something was wrong and that his experience as a dealer caused him to have this feeling (R. 92).

Mr. Timothy, on behalf of Respondent testified that he had been a dealer for three years (R. 117) that if he were suspicious of a vehicle he would know where to find the permanent number on the frame and that it was open to public view by opening the hood. Mr. Fish with at least ten years experience (R. 66) said he had never seen one and wouldn't know where to look (R. 98). Mr. Schefski, who made the positive identification of the vehicle examined the serial number stamped on the frame rail (R. 24, 25).

It is submitted, that even if the facts of agency were as asserted by the Appellant, that this evidence sufficiently establishes suspicious circumstances known to the agent which would require positive steps on his part in relation to the automobile itself, to establish physical identification of the vehicle on behalf of his principal.

CONCLUSION

It is submitted by the Respondent that the judgment of the trial Court is amply sustained by the evidence, that there was no error on the part of the trial court in ruling as he did that the Respondent purchased the automobile in question from the Appellant, and that the relationship between them was that of buyer and seller, and that accordingly, the judgment is fully sustainable. It is further submitted that even if the court were to determine that an agency relationship existed which it did not, that even in such event, the Respondent would be entitled to recover based upon the negligence of the alleged agent.

Respectfully submitted,

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